APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed January 15, 2003]

No. 02-11369
Non-Argument Calendar

D.C. Docket No. 00-00 166-CR-T-30

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT PERRY,
Defendants-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

Before DUBBING, BARKETT and HULL, *Circuit Judges.*

PER CURIUM:

Appellant Robert Perry appeals his convictions for: (1) possession of child pornography, in violation of 18 U.S.C. § 2252A(5)(B); and (2) knowingly receiving and distributing child pornography, in violation of 18 U.S.C. § 2252A(a)(2), all in violation of the Child Pornography Prevention Act ("CPPA").

On appeal, Perry contends that: (1) the evidence seized from his computer should have been suppressed; (2) *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), declaring the "appears to be" language

of the CPPA and an affirmative defense provision of the CPPA unconstitutional, requires a reversal of his convictions; (3) the district court's instructions to the jury constructively amended the indictment to broaden the possible bases of conviction; and (4) the district court's instructions regarding the definition of "knowingly" were confusing and erroneous.

In reviewing a district court's ruling on a motion to suppress evidence, we review factual findings for clear error and the court's application of law to those facts *de novo*. *United States v. Gordon*, 231 F.3d 750, 753-54 (11th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001). The facts are construed in the light most favorable to the prevailing party. *Id.* at 754.

A warrantless seizure of property, in the absence of consent, is presumptively unreasonable.[1] *United States v. Santa*, 236 F.3d 662, 668 (11th Cir. 2000). Perry argues that no exigent circumstances existed, which justified an exception to the warrant requirement. A warrantless seizure is permissible where both probable cause and exigent circumstances exist. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991) (*en banc*). While the agent had probable cause, no exigent circumstances existed justifying the warrantless seizure of Perry's computer because Perry was unaware of the police surveillance and the risk that children may view pornography is not an exigent circumstance that we have recognized. *See id.* at 1511 (explaining that circumstances are not normally considered exigent where the suspects are unaware of police surveillance or where the police officers create the exigent circumstances); *see also Santa*, 236 F.3d at 669. Perry further contends that his mother lacked any apparent or common

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[1] Perry does not assert any arguments on appeal that he did not sign the form consenting to the search of the computer freely and voluntarily. *See United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001) (explaining that arguments and issues not raised in an initial brief are deemed abandoned), *cert. denied*, 122 S. Ct. 2297 (2002).

authority to consent to the seizure of the computer. However, any errors in the district court's findings of exigent circumstances or as to the mother's apparent authority are harmless.

Notwithstanding the evidence derived from the search of Perry's computer, the evidence obtained from AOL's initiating complaints was overwhelming, such that Perry did not suffer prejudice from the other admitted evidence. *See United States v. Rhind*, 289 F.3d 690, 694 (11th Cir. 2002) (concluding that any error in admitting evidence derived from a warrantless search of a bag was harmless "because the other evidence of guilt was so overwhelming that the defendants suffered no prejudice from the admitted evidence"). Consequently, we conclude any error made by the district court in denying Peny's motion to suppress the evidence derived from Perry's computer was harmless.

Perry next argues that *Free Speech Coalition* held that the statute under which he was convicted is unconstitutional and, thus, his convictions should be reversed. However, in *Free Speech Coalition*, the Supreme Court held unconstitutional as overbroad only the "appears to be" language of the definitions of child pornography. 122 S. Ct. at 1405. Perry contends that the government indicted him under the "appears to be" language of § 2252A and, consistent with the indictment, the government offered proof at trial on the "appears to be" element of the statute.

Where claims are raised for the first time on appeal, we will review for plain error to avoid manifest injustice. *United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 1776-77, 123 L Bd. 2d .508 (1993). If an error that is plain and affects substantial rights exists, we may exercise our discretion and correct the error if it seriously affects the fairness and integrity or public reputation of the judicial proceedings. *Olano*, 507 U.S. at 731-32, 736, 113 S. Ct. at 1779.

Even if the district court erred by instructing the jury using the "appears to be" language, no miscarriage of justice occurred. *See United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) (holding that although a jury instruction using the "appears to be" language was a plain error, affirming the defendant's convictions " would neither work a miscarriage of justice nor seriously affect the fairness, integrity or public reputation of [the] judicial proceeding" as the evidence clearly established that the children depicted in the images or pictures were actual children); *see also United States v. Hersh*, 297 F.3d 1233, 1254 n.31 (11th Cir. 2002) (stating that, although *Free Speech Coalition was* not at issue, because compelling evidence existed that the images portrayed real children, the convictions on the child pornography counts were not invalid); *United States v. Bender*, 290 F.3d 1279, 1282 n.2 (11th Cir.) (noting that, although the provisions 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D) were not at issue, because sufficient evidence existed that the images portrayed real children, *Free Speech Coalition* was not pertinent to the issue in the case), *cent. denied*, 123 S. Ct. 571 (2002).

In the present case, as in *Richardson,* even if the district court erred by instructing the jury using the "appears to be" language, no miscarriage of justice occurred. Furthermore, any error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, as the evidence clearly established that the images depicted were actual children. *See Richardson,* 304 F.3d at 1063. Agent Sheehan definitively testified that, based on his professional experience, several of the video clips and images depicted persons "clearly under 18,"one of whom was under 8 years old; (2) Perry conceded in closing that actual children were involved; and (3) the exhibits in the record supported the foregoing. Consequently, because sufficient evidence existed that the images portrayed real children, his convictions were not a miscarriage of justice. Furthermore, because Perry

acknowledged that actual children were used in the images, his arguments that: (1) he was impermissibly precluded from presenting the affirmative defense that the children in the images were not real children; and (2) § 2252A(c) impermissibly shifted the burden to Perry to disprove elements of the offense, in that it required him to establish that the images did not depict children, are without merit.

Perry also argues that, the district court committed reversible error by instructing the jury that it could convict him on several different theories not alleged in the superseding indictment. Perry alleges that: (1) because he was ably charged with committing child pornography under the "appears to be language," the district court erred in instructing the jury on the other statutory definitions of child pornography; (2) he could be found guilty of receiving and distributing child pornography if the material used to produce the images had been "mailed, shipped, or transported" through interstate or foreign commerce, whereas the superseding indictment charged only that he had received or distributed images that had "been transported" through interstate commerce; and (3) he could be found guilty if the images had been mailed or shipped in interstate commerce, whereas the superseding indictment only alleged that the images had been transported through interstate commerce.

We apply a deferential standard of review to a district court's jury instructions. *United States v. Starke*, 62 F.3d 1374, 1380 (11th Cir. 1995). "So long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instructions." *Id.* (citation omitted). Because Perry failed to object to the jury instruction at trial, we will review the issue only for plain error. *Id.* "Jury instructions will be reversed for plain error only if, 'the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice, or the error seriously affects the fairness,

integrity, or public reputation of the judicial proceedings.'" *United States v. Behety,* 32 F.3d 503, 511 (11th Cir. 1994) (citations and internal quotations omitted). "A constructive amendment to the indictment occurs where the jury instructions so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged in the indictment." *United States v. Simpson*, 228 F.3d 1294, 1299 (11th Cir. 2000) (citations omitted).

As noted, Perry conceded at trial that the images depicted actual children. Consequently, Perry's substantial rights were not affected by the district court's instructing the jury on each statutory definition of child pornography. Because the charges, considered as a whole, were not so clearly erroneous as to result in a likelihood of a grave miscarriage of justice, or seriously affect the fairness, integrity, or public reputation of the judicial proceedings, no plain error occurred. *See Behety,* 32 F.3d at 511.

On appeal, Perry does not argue that the child pornography was not, in fact, transmitted in interstate commerce. On the contrary, the evidence in the record clearly established that the images, and the materials used to produce those images, traveled in interstate commerce, via the Internet, therefore, necessarily "by computer." In addition, circumstantial evidence can be used to establish the interstate commerce element. *Hersh,* 297 F.3d at 1254 n.31. Therefore, the jury instructions did not modify the elements of the offense, such that Perry was convicted on any ground not alleged in the indictment. *See Simpson*, 228 F.3d at 1299.

Finally, Perry argues that the district court erred in not instructing the jury that it had to find that he knew that the images, or that the material used to produce the images, had been transported in interstate commerce. Relying on *United States v. X-Citement Video*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), he argues that, under the CPPA, knowing the foregoing is an essential element of the offense.

He avers that the district court initially instructed the jury that, "knowingly' refers to the act of transporting, shipping, receiving and possessing the material, in this case through the use of a computer," and then later instructed that, "[t]he defendant need not know that the visual depictions or materials used to produce such depiction had been shipped or transported in interstate or foreign commerce. " Perry contends that the instructions were confusing and misled the jury to unconstitutionally convict him without a finding that he knew the images, or materials used to produce the images, were transported in interstate commerce.

Although not directly faced with the issue presented, we have construed the elements of the offense so that "knowingly" does not apply to the interstate commerce element. *Bender*, 290 F.3d at 1284 (summarily rejecting defendant's argument that the district court erred in instructing the jury that it was not required to find an intent to affect interstate commerce). Consequently, the district court properly instructed the jury that "knowingly" under § 2252(a)(2) applied only to whether (1) the individual depicted was a minor, and (2) the depiction involved sexually-explicit conduct. The instructions accurately reflected the law and, thus, the district court did not commit plain error. *See Starke,* 62 F.3d at 1380.

Accordingly and for the above stated reasons, we affirm Perry's convictions.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Mar. 13, 2003]

No. 02-11369-HH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT PERRY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Opinion_____, 11th Cir., 19__, __F.2d____).

Before: DUBINA, BARKETT AND HULL, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ineligible
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 15, 2003]

No. 02-11369

District Court Docket No. 00-00166-CR-T-3 0

UNITED STATES OF AMERICA
Plaintiff Appellee,

versus

ROBERT PERKY,
Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: January 15, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

APPENDIX D

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

Case No. 8:00-CR-166-T-171

UNITED STATES OF AMERICA

v.

ROBERT PERRY

SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT ONE

From at least on or about September 29, 1998, to on or about April 12, 2000, at Tampa, in the Middle District of Florida,

ROBERT PERRY,

the defendant herein, knowingly possessed computer images that contained images of child pornography that had been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer, and that was produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce by and means, including by a computer.

In violation of Title 18, United States Code, Section 2252A(a)(5)(B). May 5

COUNT TWO

From at least on or about September 29, 1998 to in or about December, 1998, at Tampa, in the Middle District of

Florida, and elsewhere, defendant herein, did knowingly receive and distribute child pornography, which visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct, which had been transported in interstate commerce by computer.

In violation of Title 18, United States Code, Section 2252A(a)(2). May 15

COUNT THREE

From at least on or about June 21, 1999 to in or about November, 1999, at Tampa, in the Middle District of Florida, and elsewhere,

ROBERT PERRY,

defendant herein, did knowingly receive and distribute child pornography, which visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct, which had been transported in interstate commerce by computer.

In violation of title 18, United States Codes, Section 2252A(a)(2). May 15

FORFEITURES

(A) The allegations contained in Count One through Three of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures, pursuant to the provisions of Title 18, United States Code, Section 2253.

(B) From his engagement in violations alleged in Count One through Three of this Indictment, the defendant, Robert Perry, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 2253, all of his interest in:

(A) Any visual depiction described in Title 18, United States Code, Sections 2251, 2251A, 2252, 2252A, or 2252 of this chapter, or any book, magazine, periodical, which was produced, transported,

mailed, shipped or received in violation of Title 18, United States Code, Sections 2251 through 2258;

(B) Any Property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

(C) Any property, real or personal, used or intended to be used to commit or to promote the commission of offense.

Specific property to be forfeited includes, but is not limited to:

(A) One Computer, along with keyboard, speakers, modem, and

(B) All floppy discs.

If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant:

(A) cannot be located upon the exercise of due dilligence;

(B) has been transferred or sold to, or deposited with, a third person;

(C) has been placed beyond the jurisdiction of the Court;

(D) has been substanially diminished in value; or

(E) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 2253(o), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

A TRUE BILL,

Foreperson

DONNA A. BUCELLA
United States Attorney

By:_____

Colleen D. Murphy
Assistant United States Attorney

By:_____

STEPHEN M. KUNZ
Assistant United States Attorney
Deputy Chief, Criminal Division

APPENDIX E

* * * *

[13] Or were produced using materials

* * * *

Title 18 of the United States Code, Section 2256 (a) defines child pornography as follows: Child pornography means any visual depiction, including any photograph, film, video, [14] picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually-explicit conduct where, A., the production of such visual depiction involves the use of a minor engaging in sexually-explicit conduct; B., such visual depiction is or appears to be of a minor engaging in sexually-explicit conduct.

* * * *

The term "identifiable minor" means a person who was a minor at the time the visual depiction was created, adapted or modified, or whose image as a minor was used in creating, [15] adapting or modifying the visual depiction and who is recognizable as an actual person by the person's face, likeness or other distinguishing characteristic, such as a unique birth mark or other recognizable feature, and shall not be construed to require proof of the actual identity of the identifiable minor.